No. 99-1379

In the

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

SAINT CLAIR ADAMS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT SAINT CLAIR ADAMS

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INTEREST OF *AMICUS CURIAE*

The National Employment Lawyers Association ("NELA") files this *amicus curiae* brief with the consent of all parties.[1] NELA, a voluntary membership organization exceeding 3,000 attorneys, is the country's only professional membership organization of lawyers who regularly represent employees in labor, employment and civil rights disputes.

As part of its advocacy efforts, NELA regularly supports precedent setting litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws to ensure that the laws are fully enforced and that the rights of workers are fully protected. Some of the more recent cases before this Court include: *Kolstad v. American Dental Association*, ___ U.S. ___, 119 S.Ct. ___ (1999); *Faragher v. City of Boca Raton*, ___ U.S. ___, 118 S.Ct. 2275 (1998); and *Burlington Industries v. Ellerth*, ___ U.S. ___, 118 S.Ct. 2257 (1998).

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[1] Copies of the parties' consent to the filing of this brief have been filed with the Clerk of the Court. No part of the attached brief has been authored by counsel for either party or any other entity. In accordance with Supreme Court Rule 37.6, NELA states that counsel for respondent, Michael Rubin and Cliff Palefsky, are among the over 3,000 members of NELA, and, as such, pay general membership dues. The undersigned counsel of record, also a NELA member, discloses that he is a panel arbitrator for the American Arbitration Association, which has filed an *amicus curiae* brief in support of reversal of the decision below. No persons other than the *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation and submission of this brief.

The issue of imposed compulsory arbitration—which is at the heart of this case—is currently a major focus of litigation among NELA attorneys and their clients across the country. NELA members' clients will be significantly harmed, as will the public, if employers are permitted to require—as a condition of employment—that employees be compelled to submit any employment related claims to arbitration under rules crafted by their employer, thereby prospectively waiving not only their right to a jury trial, but also their rights to have the civil rights and other employment laws applied and enforced as written.

NELA is familiar with the questions involved in this case and the scope of their presentation and feels that it would be helpful to the Court, and important to the public, to file this *amicus curiae* brief to assist the Court in the resolution of this case.

SUMMARY OF ARGUMENT

The employment relationship is an inherently unequal one. Congress recognized this when it considered passage of the Federal Arbitration Act in 1925. In response to persuasive arguments from representatives of organized labor, employment contracts were specifically exempted from the Act. Congress' conclusion that employment agreements were not the sort of contract that should come within the reach of the Federal Arbitration Act was sound—not only did it make good policy sense in 1925, it does so now. Acceptance of the argument made by Petitioner and its *amici* that the language excluding employment contracts from the Act should be read narrowly will devastate this country's ability to enforce the rights of individual, non-represented workers.

This is all the more so because in the ten years since this court decided *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20 (1991), the use of mandatory, predispute arbitration agreements has greatly expanded. Employers imposing these agreements on their workers have frequently succumbed to the irresistible temptation to deprive employees of substantive rights and remedies under the guise of choosing "just another forum" for the resolution of employment disputes. Permitting this mass "opt-out" from state and federal civil rights laws affecting the workplace would be profoundly wrong.

ARGUMENT

I. CONGRESS EXEMPTED EMPLOYMENT AGREEMENTS FROM THE FEDERAL ARBITRATION ACT FOR REASONS THAT MADE SENSE IN 1925 AND STILL MAKE SENSE TODAY.

A. Congress Intended to and Did Exclude All Employment Contracts from the Coverage of the FAA.

NELA agrees with Respondent Saint Clair Adams, his *amici* and with the overwhelming consensus of legal scholarship that, in enacting the Federal Arbitration Act (FAA)[2] in 1925, Congress intended to and did exclude *all* contracts of employment from its coverage.[3] At the time

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[2] 9 U.S.C. §1 *et seq.*

[3] *See* Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. & Lab. L. 282 (1996) (hereafter, *"Workers' Contracts"*); Finkin, *Employment Contracts under the FAA – Reconsidered*, 48 Labor L.J. 329 (1997); Archibald Cox, *Grievance Arbitration in the Federal Courts*, 67 Harv.

(continued...)

the FAA became law, there were very few written employment agreements. There were *some*, however, and the legislative record reflects that Congress was aware that such employment contracts that did exist were *not* the result of equal bargaining power, but were instruments imposed on the weaker employee by the far more powerful employer.

Opposition to the FAA came from organized labor, particularly the International Seamen's Union of America (ISU) which was afraid that arbitration clauses in individual seamen's employment agreements (*not* union contracts) would be specifically enforced if the bill under consideration became law. Arbitrators, the ISU worried, would be more likely than courts to issue orders compelling seamen to serve out the terms of these contracts—essentially imposing involuntary servitude on individual seamen with no power to resist.[4] Andrew Furuseth, the President of the ISU, criticized the arbitration bill on the ground that it would force employees to forfeit the protection of the courts: "[T]he bill provides for the reintroduction of forced or compulsory labor if the freemen through his necessities shall be induced to sign,"

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[3] (...continued)
L.Rev. 591 (1954); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 Hofstra Lab. L.J. 1, 19 (1996) and Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U.Pa.L. Rev. 91, 193, n. 438 (1998) ("The federal courts have typically found that the FAA applies to employment disputes despite statutory language that would seem to preclude such coverage.")

[4] *See* Finkin, *"Workers' Contracts," supra*, 17 Berkeley J. of Empl. & Lab. L. 282, 284-88.

Furuseth proclaimed.[5] As the available record clearly reflects, and as is thoroughly discussed in other submissions to the Court in this case, it was this opposition, mounted in conjunction with the American Federation of Labor, that resulted in the ultimate passage of the exclusion in Section 2 of the FAA now under review.

Why did this language end up in the FAA? Other parties and *amici* examine the text and the legislative history of this language of the Act, and demonstrate that the purpose of the additional language was to "prevent[ ] the enactment of any measure designed to fasten any species of compulsory arbitration *upon any group of workers in America*."[6] NELA addresses itself to a closely connected subject its members know well: we argue herein that the unique nature of the relationship between individual worker and employer, a relationship that made it inappropriate *then* (as Congress recognized) and *now* (as this Court should hold) for individual employees to be compelled to accept arbitration.

B. The Employment Relationship Is Inherently Unequal.

Since the Industrial Revolution, employment has been considered to be contractual, the product of a tacit bargain between "servant" and "master" in which the former agrees to perform services in return for a wage paid by

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[5] Proceedings of the 26th Annual Convention of the ISU, 203 - 05 (Appendix to Annual Proceedings) (1924) *quoted in* Finkin, *Workers Contracts*, *supra*, at 289.

[6] *Analysis of H.R. 13522 submitted by President Furuseth to the Convention, Which Was Adopted*, reproduced in Finkin, *Workers' Contracts*, *supra* at 301.

the latter. In the vast majority of employment "contracts," however, the contracting parties are possessed of significantly unequal bargaining power. Typically, the "master" offers terms which the "servant" may either take or leave. Meaningful negotiations rarely occur.

In the past, employees were required to accept twelve- to fourteen-hour days, substandard pay, dangerous working conditions, "yellow dog" clauses, overt, explicit job discrimination, even involuntary servitude as terms of their employment. These deplorable, unilaterally imposed job conditions existed because working people in the early part of the last century were powerless to obtain better "deals" in the countless individual contracts struck for the performance of their labor. As Congress recognized in the preamble to one of its important early twentieth century labor laws, the Norris LaGuardia Act,

> under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, *the individual unorganized worker is commonly helpless to exercise actual liberty of contract* and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment.

47 Stat. 70 (1932), 29 U.S.C. § 102 (emphasis supplied).

This unequal bargaining relationship is far from the sort of negotiation which might take place between, *e.g.*, merchants who wish the convenience of an alternative forum for dispute resolution and who therefore contract with each other for private arbitration. "Take it or leave it" arbitration clauses in employee personnel policies were not what was contemplated by the drafters of the FAA. Unlike businesses dealing with each other at arms' length, most employees represented by members of

NELA cannot actually bargain with a prospective employer as to the selection of a dispute resolution forum. In the vast majority of cases—as in the one at bar—employees must either accept imposed arbitration of disputes as a condition of employment, or attempt to find another job. They find themselves in the very dilemma presciently described by ISU President Furuseth seventy-five years ago:

> Will such contracts be signed? Esau agreed, because he was hungry. It was the desire to live that caused slavery to begin and continue. With the growing hunger in modern society, there will be but few that will be able to resist. The personal hunger of the seaman, and the hunger of the wife and children of the railroad man will surely tempt them to sign, and so with sundry other workers in 'Interstate and Foreign Commerce.'[7]

Nor, as this Court has recognized, are these individual employment agreements the same as union contracts. Collectively bargained arbitration mechanisms have a long and honorable history in the unionized workplace. Their historic role in explicating and illuminating "the law of the shop" was approved by this Court in the *Steelworkers Trilogy*,[8] but the arbitration contemplated therein is completely and fundamentally at odds with the values at stake in cases like this. First and most im-

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[7] Proceedings of the 26th Annual Convention of the ISU, 203 - 05 (Appendix to Annual Proceedings) (1924) *quoted in* Finkin, *Workers Contracts*, *supra*, at 289.

[8] *United Steelworkers v. Enterprise Wheel & Car*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

portant, the labor arbitration language reviewed in the *Steelworker* cases had been agreed to by parties of roughly equal bargaining power. The unions agreeing to this mechanism had the power—and frequently used it—to bring an employer's business to an unceremonious halt if they chose to do so. Collective bargaining agreements containing arbitration clauses were then perceived to be—and still are—contracts between equals. Second, the Court recognized the unique trade-off inherent in collective bargaining: the finality of arbitration in exchange for labor peace. Arbitration was the *quid pro quo* for an agreement not to strike for the contract's term. Third, the *Trilogy* recognized that the labor arbitrator is given a limited role: to interpret and decide *contract* issues arising out of the collective bargaining agreement itself, not to rule on issues of public law.[9]

Even so, this Court has recognized limitations on arbitration to the extent it implicates statutory claims brought by union-represented workers. It is now well settled that unionized employees are not required to arbitrate statutory and other public policy claims that do not involve interpretation of the collective bargaining agreement under which they work. Arbitration exists only to give ongoing life to the document which fixes the

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[9] *See, United Steelworkers v. Enterprise Wheel & Car, supra,* 363 U.S. 593; *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co., supra,* 363 U.S. 564. *See also,* J. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration,* 74 Wash. U. L.Q. 637, 642-43, 653-54 (1996); D. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration,* 1997 Wisc. L.R. 33, 72-73, n. 130 (1997)

"rule of the shop" in which they work.[10] This Court, lower courts and numerous commentators have recognized the obvious and vast difference between arbitration in the organized labor context and in the individual employee context.[11]

Simply put, the "contract" between the individual employee and his or her employer may not be analyzed as if it were either a commercial deal between merchants who wish the convenience of an alternative forum *or* as if it were a mechanism arrived at between union and employer for resolving grievances. It is something entirely different.

C. Because The Employment Relationship Is Inherently Unequal, It Has Been The Subject Of Extensive State and Federal Regulation.

Since the beginning of the twentieth century, as lawmakers began to grapple with the excesses of the Indus-

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[10] *See, Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 45 (1974); *Lingle v. Norge,* 486 U.S. 399, 108 S.Ct. 1877 (1988); *Wright v. Universal Maritime Services,* 119 S.Ct. 391 (1998).

[11] *See, Gilmer v. Interstate Johnson/Lane Corp.,* 500 U.S. 20 (1991); *Cole v. Burns Intern'l Security,* 105 F.3d 1465, 1476-1477 (D.C. Cir. 1997) (questioning the validity of imposing the model of collective bargaining agreement arbitration on individual employment situations where employees are attempting to enforce public statutory rights, and noting the structural protections for employees inherent in the union/collective bargaining arena); Sternlight, *Panacea, supra,* pp. 642-43 (labor arbitration as a substitute for a strike is entirely different from individual arbitration as a substitute for public judicial proceeding); J. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers and Due Process Concerns,* 72 Tulane L.R. 1, 7 (1977)

trial Revolution, Congress and state legislatures throughout the country began enacting protective legislation to protect the rights of the individual employee so that today, a vast number of statutes restrict an employer's freedom to impose terms of employment on working people. For example, federal and state laws in effect throughout the country since very near the beginning of the twentieth century prohibit the use of child labor.[12] Others, in place since the First World War era and after provide a "no-fault" system of benefits for those injured at work.[13] Depression-era unemployment insurance regulations provide a "safety net" for those suddenly deprived of work through no fault of their own.[14] Wage and hour laws regulate the minimum amounts employers may pay their employees and the maximum number of hours they may require those employees to work.[15]

In addition, during the Great Depression, Congress and many state legislatures saw fit to confer on employees the right to organize, to form and join unions or to oppose unionization.[16] California Labor Code § 923, for example,

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[12] *See, e.g.*, 29 U.S.C. § 212; Cal. Lab. Code §§ 1285-1312, 1390-1399.

[13] *See, e.g.*, Cal. Workers' Compensation Act, Cal. Lab. Code §§ 3200-6208.

[14] *See, e.g.*, Cal. Unemployment Insurance Act, Cal. Unempl. Ins. Code §§ 1-16010.

[15] *See, e.g.*, the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219; Cal. Lab. Code §§ 1171-1204.

[16] *See, e.g.*, the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-168. Congress noted that passage of the NLRA was necessary because of, "The inequality of bargaining power between employees . . . and employers . . . ." 29 U.S.C. § 151.
(continued...)

articulates the public policy of the State of California in terms which echo both the NLRA and the Norris LaGuardia Act:

> Negotiations of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, *the individual unorganized worker is helpless to exercise actual liberty of contract* and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore, it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.[17]

Since the Depression, Congress has regularly involved itself with the employee-employer relationship in order to protect the rights of employees.[18] The NLRA and other early enactments have been followed by a comprehensive

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[16] (...continued)
The NLRA was designed to "restor[e] equality of bargaining power between employers and employees." *Id.*

[17] Cal. Labor Code § 923 (West, 1989) (emphasis supplied).

[18] In 1937 this Court held that the NLRA was a valid exercise of Congressional power under the Commerce Clause. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

array of additional statutes enacted to protect employee rights.[19] Each of these acts, individually, serves as a strong statement of policy by Congress.[20]

Throughout the country, state legislatures have in many instances addressed employment inequities *before* Congress got to them. California's employment discrimination act, for instance, was first enacted in 1959 as the "California Fair Employment Practices Act" and revised in 1980 as the "California Fair Employment and Housing Act," (FEHA).[21] Section 12920 of the FEHA announces as the public policy of the state of California

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[19] *See, e.g.,* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17; the FLSA, 29 U.S.C. §§ 201-219; the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d); the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634; the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796; and the Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101-12113.

[20] Title VII of The Civil Rights Act of 1964, for example, represents an "important congressional policy against discriminating employment practices." *Alexander v. Gardner-Denver Co., supra*, 415 U.S. 36, 45. *See also,* FLSA, 29 U.S.C. § 202(a) (FLSA enacted to correct "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers"); the Equal Pay Act, Pub. L. No. 88-38 § 2 (EPA passed to cure a variety of social ills caused by wage differences based on sex); *Gilmer v. Interstate/Johnson Lane Corp*, 500 U.S. at 27 (the ADEA was designed "to further important social policies"); the Rehabilitation Act of 1974, 29 U.S.C. § 701 (Rehabilitation Act reflects national policy of respect for individuals with disabilities); the ADA, 42 U.S.C. § 12101(b)(2) (purpose of the ADA is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities").

[21] Cal. Gov't. Code § 12900, *et seq*.

> that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation.[22]

In enacting the comprehensive scheme underlying the FEHA, the California legislature sought to ensure a full range of remedies for victims of discrimination.[23] Thus, employees who bring claims for discrimination are not only entitled to the full range of tort remedies,[24] but are entitled to an award of attorney's fees should they prevail.[25] And, even though an administrative scheme exists for resolution of such claims,[26] victims of employment discrimination are *always* entitled to bring their statutory claims in a civil court action.[27]

Taken together, these state and federal statutes represent strong policies which protect employees from discrimination or other wrongful workplace conduct when they cannot protect themselves due to the vastly superior bargaining power of their employers. These laws—and many, many others like them—were passed at different

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[22] Cal. Gov't. Code § 12920.

[23] "It is the purpose of this part to provide effective remedies which will eliminate such discriminatory practices." Cal. Gov't. Code § 12920.

[24] *Commodore Home Systems v. Superior Court* (1982) 32 C.3d 211, 185 C.R. 270.

[25] Cal. Gov't. Code § 12965(b).

[26] Cal. Gov't. Code § 12960 *et seq*.

[27] Cal. Gov't. Code § 12965.

times and in response to different economic, political and social circumstances. But they represent far more than a patchwork of haphazard workplace regulations. Together, they are a powerful legislative statement that there is something *different* about the workplace, something that invites, indeed requires, a governmental presence.

D. Circuit City's Dispute Resolution Procedures Exemplify The Unfair Arbitration Provisions Forced On Individual, Non-Represented Employees.

The Respondent in this case, Saint Clair Adams, invoked the protection of the California FEHA when he filed the underlying lawsuit in this case in state court. In response, Circuit City sued Mr. Adams in the U.S. District Court for the Northern District of California to enjoin his state court suit and to compel arbitration under its "Dispute Resolution Agreement" (DRA). These procedures, which designate the American Arbitration Association (AAA) as the administrator of arbitration arising under them, significantly limit the rights of Circuit City's employees (though not of Circuit City) in the following ways: (1) They impose a one-year statute of limitations on all claims, including claims that have longer limitations periods under California law. (2) They obligate employees to pay half the cost of any arbitration, including arbitrator fees and expenses. (3) They vest complete discretion in the arbitrator to decide whether to award attorney's fees to a prevailing employee, even on statutory discrimination claims. (4) They cap the amount of front pay or punitive damages that an arbitrator could award. (5) They do not require the arbitrator to provide findings or reasoning in support of the arbitration award.

These material limitations on otherwise available remedies, taken together with the imposition of significant forum costs, make it clear that Circuit City's rules are something quite different from a straightforward proposal to its employees for "another forum" in which to resolve disputes.

Although there is no indication that Circuit City ever told Mr. Adams this, it is doubtful that—if the AAA were to follow its own oft-stated policy—it would agree to administer the arbitration in this case should it ever take place. As the AAA has explained to this Court in its *amicus* submission, it is a signatory to the "Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship" (hereafter, "the Due Process Protocol"), a document drafted by representatives of the AAA, the National Academy of Arbitrators (NAA), the Labor and Employment Law section of the American Bar Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the Society of Professionals in Dispute Resolution, and NELA. As the AAA points out,

> The Due Process Protocol requires that all participants in arbitration be accorded, *inter alia*, the right to a neutral third party decision maker, the right to select the arbitrator from a diverse pool, the right to counsel, the right to discovery as authorized by the arbitrator, the right to *the same remedies as those available in court (including the right to an award of attorneys' fees in conformity with the law), and the right to a written opinion.*[28]

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[28] Brief *Amicus Curiae* of the American Arbitration Association in Support of Reversal at p. 7.

It is also the case, as the AAA tells this Court, that it will decline to administer an arbitration program not in compliance with the due process protocol: "If the AAA determines that a dispute resolution program *materially deviates* from these due process standards, the AAA will decline to administer cases under that program."[29]

There can be no doubt that Circuit City's arbitration program falls far short of the Due Process Protocol. As noted above, it substantially shortens limitations periods, constricts the remedies an arbitrator can award and does not provide for a written decision which would enable a party to seek judicial review. Circuit City's arbitration program is deficient in other respects, as well: since it imposes substantial costs on the employee and since it permits the employer, but not the employee access to court, it does not even comply with current California law.[30]

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[29] *Id.* Given that the AAA has taken a position *in this case* in favor of Petitioner and against Respondent, it is hard to imagine how Mr. Adams could feel that he would have the benefit of "a neutral third party decision maker" (required by the Due Process Protocol) should his dispute with Circuit City end up being administered by the AAA.

[30] The California Supreme Court recently held a pre-employment agreement to arbitrate employment discrimination claims unenforceable on the grounds that it violated public policy and was unconscionably unilateral. In *Armendariz v. Foundation Health Psychcare Services, Inc.*, ___ Cal.4th ___, ___ P.2d ___, ___ Cal.Rptr. 2d ___, 2000 Cal. LEXIS 6120, No. S075942 (August 24, 2000), the court held that such agreements may be valid and enforceable, but only if they incorporate substantive and procedural protections. Specifically, they must allow for recovery of all types of relief otherwise available in court. They must also provide for neutral arbitrators, adequate discovery, and written arbitration awards. The (continued...)

E. There Is No "Public Policy' That Favors Enforcement Of Compulsory Arbitration Made A Condition Of Employment.

When he filed his state court lawsuit, Respondent invoked the FEHA, California's unequivocal statutory prohibition against employment discrimination that has been in place since the fifties. That statute explicitly provides for access to California's courts.[31] Its protections may not be waived.[32] The long history of legislation to protect those powerless to protect themselves—of which the FEHA is a part—and the social policy it represents, must prevail over the so-called "policy" favoring arbitration to which Circuit City and its *amici* herein enthusiastically refer. Indeed, the "policy" they invoke is *not* a policy favoring *all* arbitration. Rather, it is a policy favoring *voluntary* arbitration, and, of course, arbitration under agreements *covered* by, rather than *excluded* by, the FAA.

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[30] (...continued)
agreement may not require the employee to pay "either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum." (*Id.*, slip opinion at 18.) Finally, the agreement must evidence "a modicum of bilaterality," (*id.* at 39), that is, the employee cannot be bound to submit his claims to arbitration if the employer is free to litigate its claims in court.

[31] California Government Code §12965 vests "the superior and municipal courts of the State of California" with jurisdiction over FEHA claims.

[32] "It is indisputable that an employment contract that required employees to waive their rights under the FEHA to redress sexual harassment or discrimination would be contrary to public policy and unlawful." *Armendariz v. Foundation Health Psychcare Services, Inc., supra*, ___ Cal. 4th ___, ___ P.2d ___, ___ Cal.Rptr. 2d ___, 2000 Cal. LEXIS 6120, slip opinion at p. 12.

The district court in this case relied on this supposed policy "favoring" arbitration. It mistakenly pointed to the FAA and claimed that its passage was meant to indicate a new "preference" for arbitration of employment disputes. The district court got it wrong. *First,* a statute such as the FAA *cannot* create a "public policy" which contradicts the right to a jury trial and access to an Article III court. *Second,* the FAA was passed 40 years before the first federal employment discrimination laws were enacted. Thus, the FAA cannot be deemed to have ever created a "policy" superseding the provisions of the civil rights laws which ensure victims of discrimination access to federal courts and the right to a jury trial.

Third, the FAA was never intended to create a "preference" for arbitration of statutory employment disputes, much less a "public policy" favoring arbitration of them. The original intent of the FAA was simply to allow *commercial* entities of *equal bargaining power* the right to use arbitration as a dispute mechanism, at a time when arbitration was held in such low regard that many courts flatly refused to enforce pre-dispute arbitration agreements, even if they were voluntary.

In sum, Congress passed the FAA not to give a "preference" to arbitration, but simply to allow courts to *permit* arbitration of contractual matters arising out of "transactions" between commercial entities when such agreements were wholly voluntary. There is a vast difference between removing a "prohibition" on arbitration and creating a "preference" for it.

Moreover, the knowing and voluntary consent to an alternative method of resolving a workplace dispute is simply not present in the employment relationships entered into by those workers whom NELA members represent. These employees, like Respondent in this case,

are faced with "take it or leave it" policies which require them to accept an alternate—and often highly suspect—forum as a condition of employment. Coercion, not consent, lies beneath such agreements, and they cannot be held to be consistent with a federal policy in favor of arbitration.

This Court recognized this crucial distinction when it held that a "liberal" federal policy favoring arbitration simply means that if two parties have entered into a valid, *consensual* agreement to arbitrate, courts should thereafter liberally construe the *scope* of that agreement.[33] And in 1995 the Court reemphasized the point, making it clear that:

> the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that *commercial* arbitration agreements, like other contracts, are enforced according to their terms, and according to the intentions of the parties.[34]

Thus, the language of the statute, its unequivocal legislative history and this Court's recent pronouncements all point in the same direction: Congress excluded agreements between employers and employees like Circuit City and Mr. Adams from the reach of the FAA.

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[33] *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625-27, 105 S.Ct. 3346 (1985).

[34] *First Options v. Kaplan,* 514 U.S. 938, 115 S.Ct. 1920, 1925 (1995) (emphasis added).

II. EXPERIENCE DURING THE TEN YEARS SINCE THIS COURT'S DECISION IN *GILMER* DEMONSTRATES THAT IT IS NO LONGER POSSIBLE TO PRESUME THAT THE ARBITRAL FORUM IS AN ADEQUATE SUBSTITUTE FOR THE COURTROOM.

In *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20 (1991), to be sure, this Court upheld an arbitration agreement which required arbitration of a statutory age discrimination claim.[35] Petitioner and its *amici* conclude therefrom that *any* agreement, no matter how unbalanced, may be the vehicle for the disposal of *any* employment claim no matter how fundamental. They are wrong.

The ruling in *Gilmer* was based on at least two critical assumptions neither one of which NELA respectfully suggests applies to the dispute now before the Court. First, in *Gilmer* this Court stated that, "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[36] In other words, this Court accepted at face value—in the absence of proof before the Court to the contrary—that arbitration of statutory employment disputes would be "just another forum," essentially equivalent to federal court for purposes of vindicating statutory rights.

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[35] The court in *Gilmer* merely held that parties *could* arbitrate an ADEA case. It made it clear that Mr. Gilmer was not contending that he was "coerced" into signing the arbitration clause contained in his U-4 registration document. Thus, the *Gilmer* decision does not support the concept that employers may condition employment upon an arbitration agreement for statutory claims.

[36] *Gilmer*, 500 U.S. at 26.

This Court's second critical assumption in *Gilmer* was that, "the prospective litigant *effectively may vindicate [his or her] statutory cause of action in the arbitral forum*," such that the specific statute at issue would "continue to serve both its remedial and deterrent function."[37]

In the context of employer-mandated arbitration, it is NELA's experience that both of these assumptions have proven woefully unfounded. Arbitration is *not* "just another forum," and individual employees are *not* able to vindicate effectively their statutory rights. Employees *do* lose substantive rights when they are coerced into private arbitration, including the right to have the civil rights laws applied and enforced as written. The result is that the remedial and deterrent functions of the nation's employment laws are being undermined.[38] When employers are allowed to condition employment on the acceptance of arbitration, they too often use them—as Circuit City does—to tip the dispute resolution mechanism in their favor and thereby evade the reach of public law. For good reason, one court described such an overreaching arbitration agreement as "the contract between the rabbits and foxes."[39]

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[37] *Gilmer*, 500 U.S. at 28 (emphasis added).

[38] This Court has long recognized that the choice of forum may materially affect the substantive rights to be vindicated in Title VII cases. As the Court explained in *Alexander*, "arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII." *Alexander v. Gardner-Denver*, *supra*, 415 U.S. at 57.

[39] *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854, 861 (W. Va. 1998) (quoting *The Board of Education of the*

(continued...)

As a result, courts have been swamped with litigation as employers and their employees square off over deficient arbitration agreements of all sorts and types. In but one notorious example, the Fourth Circuit reviewed a pre-dispute arbitration agreement and found it to be "so one-sided" as to be a clear attempt by the employer to "undermine the neutrality of the proceeding."[40] The arbitration clause at issue in that case was especially egregious in that it, among other things, required the employee to make extensive one-sided disclosures about her case, ensured that the decision maker selected would be biased in favor of the employer and allowed the company to change the rules of the arbitration even in the middle of a proceeding. *Id.* at 938-39. Another common method used by employers to take advantage of superior bargaining power is to make the arbitration obligation run in only one direction, requiring the employee to arbitrate but allowing the employer to bring its disputes to the courthouse.[41]

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[39] (...continued)
County of Berkeley v. W. Harley Miller, Inc., 236 S.E.2d 439 (W. Va. 1977) (describing a consumer contract's arbitration clause)).

[40] *Hooters of America Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999).

[41] Circuit City's agreement has this feature. *See also Hull v. Norcom, Inc.*, 750 F.2d 1547, 1549 (11th Cir. 1985) (finding unenforceable an agreement whereby the employer reserved the right to "raise and resolve any and all disputes" in a court of law "rather than through arbitration"); *Kinney v. United Healthcare Servs. Inc.*, 70 Cal. App. 4th 1322, 1325-26 (1999) (declining to enforce an arbitration agreement that bound the employee to arbitrate her disputes but allowed the employer recourse to the courts); *Stirlen v. Supercuts, Inc.*, 51 Cal. App.
(continued...)

We have also seen arbitration agreements that:

limit remedies an employee may recover by excluding tort damages and/or punitive damages;[42]

require employees to finance significant portions of the arbitration process;[43]

limit discovery;[44]

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[41] (...continued)
4th 1519, 1528 (1997) (refusing to enforce an arbitration clause that exempted actions initiated by the company from arbitration while requiring the employee arbitrate his claims)

[42] Again, this is an advantage Circuit City secured for itself. See, also, *Paladino v. Avnet Computer Technologies*, 134 F.3d 1054 (11th Cir. 1998); *Stirlen v. Supercuts, supra*, 51 Cal. App.4th 1519; *Great Western Mortgage Co. v. Peacock*, 110 F.3d 222 (3rd Cir. 1997); *Hooters of America v. Phillips, supra*, 173 F.3d 933, 938; *Alcaraz v. Avnet, Inc.*, 933 F. Supp. 1025, 1027-28 (D.N.M. 1996); *Derrickson v. Circuit City Stores, Inc.*, 81 Fair Empl. Prac. Cas. (BNA) 1533 (D. Md. 1999), *aff'd sub nom. Johnson v. Circuit City Stores, Inc.*, 203 F.3d 821 (4th Cir.), *cert. denied*, 120 S. Ct. 2744 (2000).

[43] Once again, the DRA does this. *See, also, Shankle v. B-G Maintenance Mgt. of Colorado, Inc.*, 163 F.3d 1230, 1234-35 (10th Cir. 1999); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998); *Davis v. LPK Corp.*, 76 Fair Empl. Prac. Cas. (BNA) 954 (N.D. Cal. 1998); *Fuller v. Pep Boys — Manny, Moe & Jack of Delaware, Inc.*, 88 F. Supp. 2d 1158, 1162-63 (D. Colo. 2000); *Jones v. Fujitsu Network Commun., Inc.*, 81 F. Supp. 2d 688, 693 (N.D. Tex. 1999); *Cole*, 105 F.3d at 1485; *McWilliams v. Logicon, Inc.*, No. CIV. A. 95-2500-GTV, 1997 WL 383150, at *2 (D. Kan. June 4, 1997), *aff'd*, 143 F.3d 573 (10th Cir. 1998).

[44] *Penn v. Ryan's Steakhouses, Inc.*, 95 F. Supp. 940 (N.D. Ind. 2000); *Hooters of America v. Phillips, supra.*

establish a panel of arbitrators controlled by the employer;[45]

require arbitration in a distant location;[46]

shorten applicable statutes of limitations;[47] and

preclude or limit awards of attorneys fees or costs, regardless of whether statutes provide such remedies to prevailing plaintiffs.[48]

While it is not surprising that the foxes will ensure that they would have the upper hand in contracts they know the rabbits must accept, these one-sided agreements have led to a flood of litigation. Circuit City's arbitration program alone has been the subject of eleven reported cases of which this *amicus* is aware.[49] The

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[45] *Cheng-Canindin v. Renaissance Hotel* (1996) 50 Cal.App. 4th 676; *Penn v. Ryan's Steakhouses, Inc., supra,* 95 F. Supp. 940; *Hooters of America v. Phillips, supra; Graham v. Scissor-Tail* (1981) 28 Cal.3d 807, 623 P.2d 165).

[46] *Patterson v. ITT Consumer Financial* (1993) 14 Cal.App.4th 1659, 18 Cal.Rptr.2d 563.

[47] Circuit City's DRA does this. *See, also, Graham Oil v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1994), *supra*; *Stirlen v. Supercuts, supra.*

[48] *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459 (S.D. N.Y. 1997); *Stirlen v. Supercuts, supra; Paladino v. Avnet Computer, supra; Hooters of America v. Phillips, supra; Graham Oil v. ARCO, supra.*

[49] *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373 (4th Cir. 1998) (adequate consideration for DRA when both parties agreed to be bound by the arbitration process); *Johnson v. Circuit City Stores, Inc.*, No. 99-1449, 2000 U.S. App. LEXIS 370 (4th Cir. Jan. 12, 2000) (per curiam) (on remand, the district court held the DRA unenforceable because it failed to

(continued...)

courts in virtually every jurisdiction in the country are experiencing similar frequent recurrences of litigation over the issue.

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[49] (...continued)
provide the full set of remedies to which Johnson would be entitled to under §1981); *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634 (7th Cir. 1999) (Circuit City's promise to be bound by arbitration itself served as adequate consideration for DRA); *Wright v. Circuit City Stores, Inc.*, 82 F. Supp. 1279 (N.D. Ala. 2000) (same; exclusion language in the FAA should be read narrowly to apply only to employment contracts for workers actually engaged in the movement of goods in interstate or foreign commerce); *Circuit City Stores, Inc. v. Shelton*, No. 1:99-cv-561, 2000 U.S. Dist. LEXIS 7059 (W.D. Mich. May 16, 2000) (EEOC's decision to commence action against Circuit City does not obligate either the EEOC or individual employee to arbitrate claims); *Gannon v. Circuit City Stores, Inc.*, No. 4:00CV330 JCH, 2000 U.S. Dist. LEXIS 12125 (E.D. Mo. July 10, 2000) (DRA does not adequately protect employee's substantive rights because it limits the amount of punitive damages); *Morrison v. Circuit City Stores, Inc.*, 70 F. Supp. 2d 815 (S.D. Ohio 1999) (FAA should be read narrowly); *Sportelli v. Circuit City Stores, Inc.*, No. 97-5850, 1998 U.S. Dist. LEXIS 316 (E.D. Pa. Jan. 13, 1998) (plaintiff, a Circuit City employee prior to the imposition of the DRA, opted out of DRA, thus was not bound to compulsory arbitration); *Circuit City Stores, Inc. v. EEOC*, 75 F. Supp. 2d 491 (E.D. Va. 1999) (district court lacked subject matter jurisdiction in case in which the EEOC asserted no waiver of sovereign immunity); *Ramirez v. Circuit City Stores, Inc.*, 90 Cal. Rptr. 2d 916 (Cal. Ct. App. 1999), *rev. granted*, 94 Cal. Rptr. 2d 1 (Cal. 2000) (DRA held to be unenforceable on the basis of unconscionability by intermediate court of appeal; review granted by the California Supreme Court); *Circuit City Stores, Inc. v. Curry*, 946 S.W.2d 486 (Tex. App. 1997) (since plaintiff, another employee employed before the DRA went into effect, had the opportunity to opt out and did not, DRA not fraudulently induced or unconscionable).

Circuit City and its *amici* go to great lengths to praise the current system of employment arbitration that the AAA and others administer.[50] Workers and their representatives have a different perspective. Despite what Circuit City and its *amici* say, workers and attorneys representing workers do not favor mandatory pre-dispute arbitration and do not believe that such arbitration furthers the important statutory goals in state and federal anti-discrimination laws. Why, if arbitration is so fair, do employers have to impose it on workers as a condition of employment?

NELA and its members are *not* opposed to Alternative Dispute Resolution. NELA's members represent individuals in employment mediation *and* arbitration all the time. Indeed, we often *elect* arbitration where, after a dispute has arisen, it appears that justice will best be served thereby. But it is only when our clients *knowingly* and *voluntarily* make such elections that arbitration is appropriate. Especially since this Court has made it clear that arbitration is a matter of consent, not coercion, we believe firmly that the concept of voluntariness is essential to the very definition of arbitration, as well as to the fairness and appropriateness of how it is carried out. Contrary to the expressions of petitioner and its *amici*,

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[50] *See, e.g.* Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner at pp. 15, 18-19; Brief of *Amicus Curiae*, the Counsel for Employment Law Equity in Support of the Petitioner at pp. 5, 12, 13 and 24; Brief of *Amicus Curiae* Securities Industry Association in Support of Petitioner at pp. 13-15; Brief *Amicus Curiae* of the Texas Employment Council in Support of Petitioner at p. 25; Brief *Amicus Curiae* of the Equal Employment Advisory Council and LPA, Inc. in Support of Petitioner at pp. 12-17, and Brief *Amicus Curiae* of the American Arbitration Association in Support of Reversal at pp. 10-12.

there simply is no policy favoring mandatory arbitration. In enacting the FAA, Congress meant nothing more than to encourage voluntary resolution of commercial disputes outside of the courts; it did *not* intend to set up a separate and unequal system of justice for unrepresented employees.

CONCLUSION

Congress was aware of the disparity in bargaining power between employers and workers in 1925 and exempted all employment contracts from the FAA for that very reason. That disparity still exists, and the FAA should not be "interpreted" to cover a class of agreements Congress explicitly, and for good reason, chose to exempt. The decision of the Ninth Circuit should therefore be affirmed.

Respectfully submitted,

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